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Jack E. Lake v. Robert J. Pinder : Brief of Respondent and Cross-Appellant

Utah Supreme Court

McBroom & Hyde;

IN THE SUPREME COURT OF THE STATE OF UTAH

JACK E. LAKE,
Plaintiff, Respondent, and Cross-Appellant,

— vs. —

ROBERT J. PINDER,
Defendant and Appellant.

Case No. 9382

BRIEF OF RESPONDENT AND CROSS-APPELLANT

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STATEMENT OF FACTS AND OF PROCEEDINGS BELOW

We cannot agree with the statement of facts outlined in the appellant's brief. The facts as developed at the trial of this case amply justify the findings of the trial court and the judgment rendered on the question of liability.

During the latter part of February, 1958, the defendant, Robert J. Pinder, met the plaintiff, Jack E. Lake,

in Denver, Colorado, to discuss two business propositions:

a) A joint venture between Lake and Pinder to exploit a franchise agreement owned by Lake to distribute therapeutic massage equipment in the State of Texas manufactured by Life Massage and Home Equipment Company; and,

b) The exchange of mining stock owned by Lake in the L. H. & L. Mining Company for stock in the Standard Gilsonite Company, of which Pinder was the president.

With respect to the former venture it was agreed by Pinder that he would lend to the venture between $10,000.00 and $15,000.00 as working capital to reimburse Lake for expenses incurred in obtaining training in Denver, his living expenses while organizing the business in the State of Texas, and for advertising and other expenses of building a sales organization in Texas. It was agreed that from the first profits from the venture Pinder would first receive back the money loaned and then the two would each draw an equal salary from the company and divide any profits. (R-53, 57, 67, 68, 217, 218, 222, 223, 224) Pinder agreed to have his Texas law firm incorporate the venture. (R-57) Pinder, pursuant to this agreement, loaned $2,000.00 to the venture to help pay the expenses and in addition paid to Stanley Lake, the plaintiff's brother who owned the master franchise for the Western States, Hawaii, and Alaska, additional sums for advertising for salesmen in Texas, travel

expenses, and other expenses aggregating approximately $800.00. (R-226) Thereafter Pinder met Stanley Lake, one of the three owners of the master franchise for the Western States, Hawaii, and Alaska, and Jack Lake, the plaintiff, in Houston, Texas, to plan the setting up of the Texas operation. They had a prospective State Manager travel from San Antonio to Houston for Pinder to interview, and Pinder, after indicating his satisfaction with the man, agreed to advance the candidate $400.00 expenses to go to Denver to be trained. (R-77, 78, 227, 228, 229) Pinder later advanced further funds from the proceeds of the sale of certain Standard Gilsonite stock, a transaction hereafter more fully described, and loaned the proceeds to the venture but failed to advance the funds agreed to be advanced and later refused to keep his end of the bargain and announced to Stanley Lake in a conversation in Salt Lake City that he would, if necessary, even deny ever being in Texas. (R. 234, 235) This conversation with Stanley Lake is not denied by Pinder.

With respect to the exchange of L. H. & L. stock owned by Jack Lake for Standard Gilsonite stock, an agreement was signed by Pinder receipting for the L. H. & L. stock and making Pinder a trustee for Lake to effect the transaction. The document (Ex. -2) contains the following language written in Pinder's own handwriting:

> "I hand you forthwith a receipt for 7,500 shares (Seven Thousand Five Hundred) L. H. & L. mining stock as trustee to be delivered to Standard Gilsonite upon payment of Thirty-Seven Thousand Five Hundred (37,500) shares of Standard

stock. Said stock to be escrowed on delivery as mutually agreed.

R. J. Pinder, President
Standard''

Pinder received possession of the stock, flew in his private plane to Salt Lake City, Utah, and promptly violated the trust agreement by delivering the L. H. & L. stock to Standard Gilsonite Company before receiving the Standard stock owned by Lake.

> Q. And what did you do with Mr. Lake's stock?
> A. I brought it to Salt Lake, I believe that evening, and the next day gave it to the Treasurer of Standard Gilsonite Company. (R-252, 253)

The plaintiff brought suit in June, 1958, and the defendant did not even cause the stock to be issued until January 19, 1959, almost one year after the trust agreement was entered into. (R-157)

Pinder agreed at the time the transaction was made, to sell the stock for Lake at the best possible price and represented he had special knowledge of the market and could get a better price for Lake than Lake could get for himself. Lake agreed to escrow his stock with Pinder and to let him act as his trustee to sell the stock for him. (R-62, 63, 215)

In April, 1958, Pinder explained to Jack Lake that he wished to sell some of his (Pinder's) stock in order to meet his commitment to Lake to put up the necessary capital for the Life Massage franchise in Texas but that it would embarrass him as President of Standard to have

it appear to his investors that he was selling his own stock at a cheap price, and asked Lake to let him borrow some of his (Lake's) stock for delivery, and promised to replace it.

> "He said, after all, I am trustee for you. All I have to do is transfer stock back into the account for you." (R-74)

Lake agreed to let Pinder handle this transaction and signed two letters authorizing Pinder to cause the stock to be transferred to Pinder's buyers. Mr. Lake received $4,000.00 from the first transaction which he turned over to Pinder and $5,000.00 from the second sale which was put in the joint venture bank account. Pinder advanced only about one-half the funds he agreed to advance for the Texas venture and then took the position that the stock had really been sold for the account of Lake and denied any participation whatever in the Life Massage venture and refused to issue any stock whatever to Lake. Before trial the Standard Gilsonite Corporation, pursuant to a stipulated settlement, issued to Lake 6,500 shares of stock as a settlement of its liability and was dismissed. (R-6)

The trial court found in favor of Lake on all the issues and fixed the damages at the price of the stock when sold by Pinder to the Texas, Witherspoon and McGee.

The defendant made a motion for a new trial and among other points argued that the court erred in its opinion that the endorsements on the back of the checks

made payable to Lake as a loan to the Life Massage venture were put on after the checks were cashed. This was argued at length to the trial judge who advised counsel that the motion for a new trial did not properly raise this issue and that this was immaterial to the decision in any event, since both sides agreed that the funds were advanced as a loan and the court had found that these funds were loaned pursuant to the agreement by Pinder to finance the Life Massage venture and whether the legend on the checks recited that the money was a loan did not make any difference and that the court still chose to believe the evidence given by the plaintiff and his witnesses rather than the defendant's evidence. The court pointed out that if the defendant intended the motion for a new trial to be based upon newly discovered evidence no supporting affidavits were on file and the court could not consider the suggestion that there was newly discovered evidence available.

The court further stated that it did not mean to convey the impression that its decision was based upon the presence of absence of the legend on the checks since all agreed they were loans, and this would not effect the court's decision in the case even if the proper motion had been made.

The defendant appealed from the judgment of the trial court. The plaintiff cross-appealed from the conclusion of law and judgment on the sole ground that the court erred in the determination of the measure of damages. At the trial the evidence showed that during 1958

the stock rose to a price in excess of $2.50 per share during the year following the time Pinder refused to deliver the stock to Lake. The trial judge fixed the damages as of the day that Pinder had his stock transactions with McGee and Witherspoon in March, 1958, instead of the highest market price. The plaintiff contended that the measure should have been of the highest market value within a reasonable time after Pinder repudiated the trust agreement in May, 1958, and refused to cause the stock to be delivered to Lake.

STATEMENT OF POINTS

Point I.

THAT THE FINDINGS OF FACT MADE BY THE TRIAL COURT ARE ALL SUPPORTED BY SUBSTANTIAL EVIDENCE.

Point II.

THE EVIDENCE AND THE UNCHALLENGED FINDINGS OF THE TRIAL COURT ARE SUFFICIENT TO SUPPORT THE CONCLUSIONS OF LAW AND JUDGMENTS.

Point III.

THE DEFENDANT - APPELLANT MADE NO MOTION FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE YET ATTEMPTS TO PRESENT NEW EVIDENCE TO THIS COURT ON APPEAL BY AFFIDAVIT AND ARGUMENT IN HIS BRIEF.

Point IV.

THE COURT SHOULD HAVE AWARDED THE PLAINTIFF THE HIGHEST MARKET PRICE OF THE STOCK FROM THE TIME OF REFUSAL TO DELIVER THE STOCK TO WITHIN A REASONABLE TIME THEREAFTER.

ARGUMENT

Point I.

THAT THE FINDINGS OF FACT MADE BY THE TRIAL COURT ARE ALL SUPPORTED BY SUBSTANTIAL EVIDENCE.

The appellant complains that the Findings of Fact made by the trial judge are unsupported by the evidence in five particulars. He apparently concedes that in all other respects they are supported by substantial evidence. In the interest of clarity we will treat each objection as made.

> "a) That the court erred in finding that the defendant agreed with the plaintiff to deliver the L. H. & L. stock 'only upon the payment to the plaintiff of 37,500 shares of the capital stock of Standard Gilsonite Company.'" (Appellant's brief P-14)

The appellant abstracts only a portion of an isolated statement from the record made by the plaintiff to attack this finding. The finding is clearly supported by the great weight of the evidence:

1. The trust agreement itself (Ex. -2) clearly states that the L. H. & L. stock of Lake's is "to be delivered to

Standard Gilsonite upon payment of Thirty-seven Thousand Five Hundred shares (37,500) of Standard stock to be escrowed on delivery as mutually agreed.'' This clearly empowers the trustee acting for Lake to deliver Lake's stock only upon payment of the Gilsonite stock.

2. Jack Lake testified as follows:

> ''. . . he would not deliver my L. H. & L. stock until he made sure they would issue the 37,500 shares which he would hold for me because he had a place on it and could sell it at places better than the local brokers, so I signed a letter stating he was acting as my trustee.'' (R-62)

The above was the explanation of the conversation prior to executing the trust agreement. The Defendant-Appellant Pinder drafted the trust agreement and the terms are clear and unambiguous in regard to this point. The plaintiff, Jack Lake, had no formal education except grade school and relied upon Pinder to draft the agreement. (R-106) On cross-examination by the defendant's attorney the plaintiff further explained his understanding of the trust agreement:

> ''Q. What does the word 'trustee' mean to you, Mr. Lake? Have you had any law training?'
>
> A. Well, I never had any training. Well, in my thinking it means you give to someone and you trust him to hold it.
>
> Q. With your L. H. & L. stock?
>
> A. Well, he gave me a letter to sign.
>
> Q. Well, this is what you were really trusting him with? Do you think the trustee is under a duty to go get your stock fro msomebody else?
>
> A. Well, he said he would.'' (R-112, 113)

The trust agreement also provided that the Gilsonite stock when issued would be escrowed with Pinder to be sold for the benefit of Lake. The Defendant-Appellant does not challenge the portion of the paragraph 2 of the Findings of Fact that Pinder agreed to act as a trustee for Lake to receive Lake's stock and dispose of it for Lake's benefit:

> "The defendant requested that the plaintiff permit the defendant to receive the plaintiff's stock to be issued in Standard Gilsonite Company as trustee for the plaintiff, representing to the plaintlff that because of his peculiar and intimate knowledge of the market for said stock, and of the condition of Standard Gilsonite Company, that he would be able to obtain the best possible market price for said stock, and that he would sell 15,000 shares of said stock for the plaintiff at a minimum of $1.00 per share, and assured the plaintiff that he would be able to sell the balance of said stock from time to time at a substantially higher price, and that the defendant would sell the stock at the best possible price and remit the proceeds to the plaintiff." (R-16)

Hence the Appellant at least admits that Pinder agreed to obtain the stock for Lake and act in a fiduciary capacity to sell it at the best market price for Lake's benefit and that he guaranteed Lake at least $1.00 per share on 15,000 shares and a higher price on the balance.

> "b) That the court erred in finding 'that the defendant breached his trust agreement and delivered the plaintiff's L. H. & L. stock to Standard Gilsonite Company immediately upon his return to Salt Lake City from Denver, Colorado." (R-16)

This finding is supported by Pinder's own testimony:

> "Q. And what did you do with Mr. Lake's stock? A. I brought it to Salt Lake, I believe, that evening, and the next day gave it to the treasurer of Standard Gilsonite Company." (R-252, 253)

This was a direct violation of the terms of the trust agreement that the L. H. & L. stock was to be delivered to Standard Gilsonite *upon payment* of Thirty-seven Thousand Five Hundred shares (37,500) of Standard stock." Appellant argues in his brief that this was not a breach because "the evidence did not show there was anything that would lead defendant to believe that Standard Gilsonite would not issue the 37,500 shares agreed upon to plaintiff." (Appellant's brief P-15)

We submit that this excuse for the breach of trust is no excuse at all. The delivery of the stock by the trustees was a breach of the terms of his own agreement regardless of whether he anticipated that Standard Gilsonite would not issue the stock. This agreement is particularly specious in the light of the fact that Pinder was the chief executive officer of Standard. Appellant argues that the failure to deliver the Standard stock was because the secretary of Standard experienced some difficulties in accomplishing transfer of the L. H. & L. stock. This is a distortion of the record. The L. H. & L. stock was transferred many months before any Standard stock was issued to Respondent. Further, the trust agreement provided that the L. H. & L. stock would not even be delivered until the Standard stock was issued.

"c) That the court erred in finding that 'the defendant, Robert Pinder agreed with the plaintiff that he would advance the venture $15,000.00 to provide working capital for the organizational expenses, including the living expenses and expenses already incurred by the plaintiff, Jack E. Lake while in training with the Life Massage and Home Equipment Company in Denver, Colorado. (T-17)

Appellant attacks this finding because there are uncertain sums mentioned in the testimony as to the exact amount that would be necessary to get the Texas franchise operating. At one time it was estimated that between $12,000.00 and $13,000.00 would be needed to safely get the business going. (R-56) It was explained to Pinder by Stanley Lake, owner of the Western States franchise, that it might take as much as $15,000.00 to pay the expenses of getting the Texas franchise going. (R-222) Pinder said "there would be no difficulty whatsoever in putting up that amount of money to finance the Texas situation." (R-223)

We submit this point is of no consequence anyway. It was agreed by Pinder that the $2,500.00 advanced to Lake would come out of the profits of the Texas venture (R-127) and was a part of the Pinder commitment:

"This $2,500.00 you are referring to was a portion of the $12,000.00 or $13,000.00. This was a part of this obligation. I had this obligation in order to keep my franchise." (R-127)

The money advanced by Pinder consisted of $2,000.00 to Lake to take care of expenses incurred in his training in Denver and Texas, $500.00 advanced to pay the ex-

penses of Stanley J. Lake and approximately $300.00 in advertising and other expenses. (R-189, 242, 69)

> "c) The court erred in finding 'that the defendant did not intend to deliver the stock to the plaintiff as agreed but intended to defraud him of his stock.' " (T-19)

Appellant objects to the above finding. While this finding by the trial judge is not at all necessary to find liability, it being sufficient to support the judgment that the defendant simply failed to deliver the stock as agreed, the evidence almost impels such a conclusion. The appellant does not challenge paragraph 2 of the findings and these alone would be sufficient to justify such a conclusion and alone would be sufficient to sustain the judgment.

The appellant further does not challenge the findings made by the trial court contained in paragraphs 4, 5, 6, and 7, with the exception of the portions deleted hereafter and the above quoted findings respecting the intent of Pinder. We submit that from the following portion of the findings not challenged by appellant no other conclusions could be reasonably drawn:

> 4. That prior to the delivery to the defendant of the L. H. & L. stock, the plaintiff and defendant entered into an agreement to establish a joint venture for the sale of the products manufactured by the Life Massage and Home Equipment Company under a franchise for the State of Texas. Pursuant to this agreement the defendant advanced the sum of $2,000.00. The defendant, pursuant to the joint venture, requested that the Company Sales Manager and other per-

sonnel from the Life Massage and Home Equipment Company in Denver proceed to the State of Texas and interview sales personnel there to obtain a State Manager. The defendant Pinder wired $500.00 to Denver to pay the traveling expenses incurred by the home office personnel in traveling to the State of Texas, and paid for the advertising to obtain personnel in Texas. Subsequently the defendant Pinder met with the plaintiff and with Stanley Lake in Houston, Texas, for the purpose of setting up of the proposed Texas organization, and did interview an individual from San Antonio who, it was agreed, would go into training in Denver to prepare to be the State Manager, and the defendant agreed to pay his expenses. The defendant failed to advance any additional funds to the venture. The defendant promised to have his attorneys in Dallas, Texas, set up a corporation to receive an assignment of the franchise and to have his bookkeeper in Salt Lake City set up the books and records for the venture, but did not do so.

5. That on or about the 4th day of April, 1958, the defendant called the plaintiff on the telephone and advised the plaintiff that he had a plan which would enable him to put into the joint venture a portion of the $15,000.00 agreed upon and asked the plaintiff to meet him in Amarillo, Texas. At that meeting he explained to the plaintiff that he had large amounts of stock in Standard Gilsonite Company but that as President of the Company he could not sell the stock himself because it would be embarrassing to him if it was known that he as President of the Company was selling his stock, and that if the plaintiff would authorize him to sell some of his stock to the proposed buyers who were already stockholders in the corporation he would either deliver straight stock to fill the order or would, if he used the plaintiff's stock, replace it

immediately with other stock, The plaintiff agreed to permit the defendant to do this, and they went to Hereford, Texas, to the offices of James W. Witherspoon. The defendant went into conference in the private office of James W. Witherspoon and the plaintiff was left in the waiting room until the transaction was completed. The plaintiff was asked to sign a document authorizing the transfer of 16,000 shares of the stock of Standard Gilsonite Company and was given a check for $4,000.00. Immediately after leaving the office of James W. Witherspoon the defendant requested that the check be endorsed over to him, which the plaintiff did. The plaintiff then asked the defendant if he was not going to put the money into the Life Massage and Home Equipment Venture, and the defendant told the plaintiff that he needed some of the money for a short time, and asked the plaintiff how much money he needed to pay bills incurred in the venture. The plaintiff indicated that there were about $1,300.00 in bills incurred, and the defendant then gave him his check for the $1,300.00. At a subsequent meeting in Houston in the Buffalo Inn Motel, the plaintiff and the defendant discussed the progress of their business venture, and the plaintiff advised the defendant that they needed additional funds to carry on the business. The defendant promised the balance of the $15,000.00 as agreed, and suggested that the defendant would sell an additional 15,000 shares of stock to Mr. Witherspoon and associates at 30 cents a share. The defendant dictated a document for the plaintiff to write and execute, and showed the plaintiff how to execute a draft on the said James W. Witherspoon. In both transactions the defendant assured the plaintiff that the sale of the stock was a personal transaction between the defendant and the said Witherspoon and associates, and that the plaintiff would receive his

entire 37,500 shares of stock in due course. . . . R-16, 17, 18, 19, 20)

"f) That the court erred in finding that 'the defendant did not cause the 37,500 shares of stock due the plaintiff to even be issued until May of 1959. That he thereafter caused the stock to be transferred to persons other than the plaintiff.' " (T-20)

The respondent concedes that the date of May should have read January in the findings. This error has no significance so far as the ultimate facts are concerned. The undisputed fact is that the Appellant, Robert J. Pinder, was the chief executive officer of Standard and had the authority from both Standard and the Respondent Lake, to effect the transaction as agreed between Standard and Lake. To deny that Pinder was not responsible for causing the stock to be transferred to persons other than the plaintiff is to ignore the unchallenged portion of the trial court's findings of fact, 2, 3, 4, 5, and 6 cited above. Regardless of who actually had the duty in Standard to do the clerical work incident to the actual transfers of stock, this was done under the authority of the President and not the Secretary or the Office Manager, Borshard. The attempt to justify the failure of Pinder to cause the stock to be issued as agreed cannot be justified by reliance on the letter of authority to the Hereford Bank (Ex. -21) or the stock power in view of the unchallenged findings contained in paragraph 5 (Supra) where the court found the letter and stock power were given to assist Pinder to raise funds to buy into the Texas franchise and that Pinder promised to issue the stock to Lake and to take the trade himself. These

undisputed findings show that Lake, by executing the documents (Ex. -21, 22), did not intend to give up any rights as contended for by appellant.

Point II.

THE EVIDENCE AND THE UNCHALLENGED FINDINGS OF THE TRIAL COURT ARE SUFFICIENT TO SUPPORT THE CONCLUSIONS OF LAW AND JUDGMENTS.

The appellant takes exception to the findings of fact made by the trial judge in six particulars (see exceptions numbered A to F, at pages 14, 15, 16, and 17 of Appellant's brief). The remainder of the findings are not challenged and these findings alone justify the conclusions of law and judgment made by the trial court.

The court found that the defendant Pinder agreed to deliver the plaintiff's L. H. & L. stock only when Standard Gilsonite Company had issued in payment 37,500 shares of Standard Gilsonite stock. Pinder further agreed to handle the sale of this stock as trustee for Lake and to sell it at the best possible prices and even guaranteed to sell 15,000 shares at *not less than* $1.00 per share. (R-16)

The defendant protests that Pinder could not be a trustee because there was not yet any stock issued to Lake and therefore there was no trust res. This contention is without merit on two grounds:

1. Pinder held the authority from Lake to act as trustee in his stead to receive the 37,500 shares of stock.

We have no argument as to the general proposition of law cited from the Restatement of Trusts, Vol. 1, Sec. 75, at page 20 of appellant's brief, but this has no application here. Lake had a *contractual* right to receive 37,500 shares of Standard Gilsonite stock and Pinder had agreed to act as trustee for Lake to obtain this stock. Pinder was trustee of this *right* and had a duty to carry out the trust agreement made with Lake. He occupied the position of chief executive officer of Standard and it was within his power to have it issued — the Board of Directors having already approved the issuance of the stock. A trust can be created of a right arising out of contract just as well as of any other property.

> "Thns, it is held that a trust may exist in a bond, *chose in action,* contingent interests, expectancies. . . . (emphasis supplied) 89 C. J. C. No. 24, Page 740.

We do not see how the defendant can seriously contend that a trustee appointed and agreeing to execute a valuable contractual right, i. e., to receive stock his beneficiary is entitled to, and who is further empowered to sell that stock for the benefit of another, can deny his fiduciary capacity and duties because he causes the stock to be issued to others!

2. Regardless of this argument with respect to the existence of a trust the undisputed findings and the evidence conclusively show that Pinder agreed to obtain the stock for Lake and to dispose of it for Lake's benefit and he breached this agreement. The conclusion of law is supported by this finding also. The argument that

this is a gratuitous offer to create a trust and therefore without consideration, does not apply here. In this case Pinder extracted an agreement from Lake that he would allow Pinder to sell the stock for him so as not to harm the market for the stock which Pinder was anxious to establish for his own benefit as a major stockholder in the company:

> "As we agreed," he says, "you won't go out naturally and dump this stock on the market. We are trying to build a market." . . . "He said this market was supposed to be around $3.00 about the last of March or middle of April." (R-62) . . . he would not deliver my L. H. & L. stock until he made sure they would issue 37,500 shares which he would hold for me because he had a place on it and could sell it at places better than local brokers." (R-62)

In addition to the above Lake agreed to allow Pinder to benefit personally from the arrangement by assigning part of his right to the stock to assist Pinder in obtaining funds to meet his commitments to the Home Equipment venture. The agreement was bilateral and adequate consideration was present to bind Pinder to perform. (See the undisputed portions of the court's findings of fact, paragraphs 2, 4, and 5. (R-16, 17, 18, 19) Pinder became trustee of the contractual right of Lake to the stock and he cannot avoid his fiduciary or contractual duties to Lake by the spurious argument that since Pinder saw fit to not cause the stock to issue no trust could arise and the agreement was without consideration. The citations in appellant's brief as to gratuitous agreements to create a trust (appellant's brief, P. 19,

20, 21, 22) do not apply since not only was the Lake-Pinder agreement bilateral for the reasons set forth above but if there was no further consideration than the act of Lake parting with his L. H. & L. stock, the agreement would be supported by an adequate consideration.

> "That a detriment suffered by the promisee at the promisor's request and as the price for the promise is sufficient, though the promisor is not benefitted, is well settled. It will be found that in most cases where there is a detriment to the promisee there will also be a benefit to the promisor, because when the promisee does something detrimental to himself at the request of the promisor, the promisor must be assumed to make the request because he desired the performance in question and regarded it as beneficial to himself." (Williston on Contracts, No. 202, at pages 377 and 378.)

The appellant in its brief spends seven pages arguing that there can be no conversion of the stock since it had never been issued by the corporation. This argument and the cases cited in the support have no relevance to this case. The amended complaint (R-8, 9, 10) and the findings of fact at no place state that the stock was converted and the court certainly did not make its determination on this theory. The theory of recovery pled in the amended complaint is that Pinder entered into an agreement with Lake to do the following things:

a) To act as a trustee of Lake's stock in L. H. & L. Mining Company and deliver it to Standard only when he caused the issuance of 37,500 shares of Standard stock to Lake.

b) To cause the 37,500 shares of stock to issue to Lake.

c) To hold the Standard stock and sell it for Lake's benefit.

The court found that he made this agreement and that he breached it. It is not necessary to even consider the law of conversion as it might apply to the facts of this case.

Point III.

THE DEFENDANT - APPELLANT MADE NO MOTION FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE YET ATTEMPTS TO PRESENT NEW EVIDENCE TO THIS COURT ON APPEAL BY AFFIDAVIT AND ARGUMENT IN HIS BRIEF.

The defendant-appellant urges this court to reverse the judgment of the trial court on the ground that the court believed that the legend on the back of two of the checks given by Pinder to Lake were placed on the checks after they cleared the bank, and that this was not a fact. This point cannot properly be considered by this court on appeal because it has never been properly raised by the appellant either before the trial court or this court.

The defendant-appellant made a motion for a new trial on September 21, 1960. The motion was *not* based on any "newly discovered evidence" (Rule 59 (a) (4) Utah Rules of Civil Procedure), that the trial court was wrong in its conclusion as to the time of the endorsements nor on the ground of "surprise" (Rule 59 (a) (3)

Utah Rules of Civil Procedure) but solely on the ground that the "evidence was insufficient to justify the decision" and "that the decision is against the law and that there was an error in applying the law to the evidence introduced." (R-23)

The motion was argued on November 4, 1960, and while defendant argued that the court's comments with respect to the endorsements on the checks did not correspond to the facts and stated that he could prove this, no evidence was offered. On January 16, 1961, two months after his motion for a new trial had been denied, and one month after defendant-appellant had filed his notice of appeal, appellant's attorney filed an affidavit purporting to prove the fact that the endorsement was on the checks at the time they were given to the plaintiff and argues this as evidence in his brief on appeal just as if it was part of the record.

If the defendant's appellant could not have had this evidence available at the trial Rule 59 (a) (4) permits him relief to present this new evidence to the Trier of Fact by making a motion under this rule *provided the motion is supported by affidavit* as required by Rule 59 (c).

No such motion was ever made by the defendant-appellant. Even though he had from September 14, 1960, to November 4, 1960, to obtain the alleged evidence he made no offer to the trial court and then after his motion for a new trial had been denied for two months he filed an affidavit on January 16, 1961, attempting to put this evidence into the record. It would indeed be a novel rule of

procedure that would permit a litigant to introduce new evidence for the first time on appeal having failed to even make a motion for a new trial based on newly discovered evidence.

Point IV.

THE COURT SHOULD HAVE AWARDED THE PLAINTIFF THE HIGHEST MARKET PRICE OF THE STOCK FROM THE TIME OF REFUSAL TO DELIVER THE STOCK TO WITHIN A REASONABLE TIME THEREAFTER.

At the trial of this action the evidence showed that in th month of April, 1958, the defendant, Robert J. Pinder, a trustee of securities owned by the plaintiff, induced the plaintiff to execute what in effect were stock powers on the representation that the defendant desired to sell certain stock owned by him in order to raise money to put into a joint venture between the two parties, and agreed that either the plaintiff's stock, if used, would be replaced by stock of the defendant's or that the defendant would cause other stock to be issued to the purchasers, but in any event that the defendant would carry out his trust obligation to hold the 37,500 shares of stock to which the plaintiff was entitled and to sell the same for the benefit of the plaintiff. The evidence further shows that the defendant continuously promised that the 37,500 shares of stock would be issued to the plaintiff, and periodically advised the plaintiff that the stock had in fact been issued. The plaintiff in the fore part of June, 1958, made demand upon the defendant for the stock, and the defendant then failed to deliver the stock.

The plaintiff respectfully submits that the measure of damages to be awarded the plaintiff in this action is the highest market value of the stock from the time of refusal of the defendant to deliver the stock to the plaintiff in June of 1958 to within a reasonable time thereafter.

The question was considered in the case of *Western Securities Co.* v. *Silver King Consolidated Mining Co.*, 57 Utah 88, 192 Pac. 664. In that case the stock was delivered to the defendant pursuant to a pledge agreement on the 20th day of February, 1914. The stock instead of being held was transferred and converted, and the lower court found that the failure to hold the stock as security and the act of transferring it upon delivery constituted a conversion of the stock. On appeal the question was raised as to whether the plaintiff was entitled to the value of the stock at the date of conversion or to the higher value at a time some months subsequent to the conversion. In discussing this question the court set forth the following rule:

> "If it be assumed, however, that the sale was void and that appellant was guilty of conversion of the stock, the judgment is, nevertheless, contrary to law. The ordinary rule governing the measure of damages in cases where the pledgee wrongfully converts property pledged is the market value of the property pledged, with interest from the time it was converted. If the pledged property consists of stocks or bonds of a fluctuating market price, then the measure of damages, under the New York rule, is the highest market price of such stocks or bonds within a reasonable time after the pledgor obtained notice of the sale of stock or bonds which was illegally made." (West-

ern Securities Co. v. Silver King Consolidated Mining Co., 192 Pac. 664 to p. 672.)

This rule was also followed by the Federal Court in the case of *Nephi Processing Co.* v. *Talbott,* 247 Fed. 2d 771. In this case the item converted happened to be turkeys delivered to the defendant. The question raised before the appellate court was whether or not the plaintiff was entitled to the value at the date of conversion or the highest market value within a reasonable time after the conversion. The lower court granted the plaintiff an instruction that the plaintiff was entitled to the highest market value and the defendant appealed on the ground that this instruction was in error and that the court should have instructed that the measure of damages was the value of the turkeys on the date of conversion. The court determined the question in the following language:

> "The Utah courts have recognized that as a general rule the measure of damages for conversion of property is the value of the property at the time of the conversion, plus interest. . . . It has been held, however, that the rule has no application where the converted chattels are of a kind which have a fluctuating value. In such cases the measure of damages is the highest market price of the property within a reasonable time after the owner has notice of the conversion. Restatement Law of Restitution, Par. 151 (c); 53 Am. Jur., Trover and Conversion, Sec. 99, Gallagher v. Jones, 129 U. S. 193, 9 Supeme Court 335, 32 Law Ed. 658, Newberger Cotton Co. vs. Stevens 167 Ark 275, 267 S. W. 777, 40 A. L. R. 1279 In Re Solomon, Weed & Co. Inc., 53 Fed. 2d 335, 79 A. L. R. 379. See also 40 A. L. R. 1282, 87 A. L. R.

817. The Utah Supreme Court has accepted this rule.''

In the *Nephi Processing case* the conversion of the turkeys occurred in February of 1954. The court permitted evidence of the highest market value between 54, 55 and 56, and granted the highest market value which was in December of 1954. In the *Lake* v. *Pinder case* it is difficult to determine exactly when the breach of trust took place. Certainly there was no denial of the right of the plaintiff to the stock up to June of 1958 when demand was made for delivery of the stock. Prior to that time the defendant had recognized his trust and had assured the plaintiff that he would carry it out by obtaining the stock for the benefit of the plaintiff and selling the stock at the best possible market price for the benefit of the plaintiff. It was not until June of 1958 that the plaintiff after repeated assurances and promises from the defendant demanded the stock and the defendant failed to deliver it.

Under the above cited cases the appropriate measure of damages to be applied is the highest market value from June of 1958 until the time of trial which was at least $2.50 per share. See Exhibits 14, 15, 16, 17 and 18. The witness, Kay Ralph Bowman, sold stocks at $2.50 per share in May, 1959 (R-93). Gus & Stead, brokers, traded large amounts as shown by their records. The National Quotations exceeded $2.50 per share.

The court treated the trust agreement as breached as of the time of the transaction with McGee and Witherspoon in April, 1958, and fixed the damages as of that

time when there was only a $.30 per share market for the stock. This was in error since until June there was actually no refusal on the part of Pinder to carry out the agreement; in fact, he constantly promised to do so. The damages therefore should have been the highest market value from June, 1958, until a reasonable time thereafter, which under the rule of *Nephi Processing Co.* v. *Talbott,* 247 Fed. 2d 771, would be at least a year thereafter. During this period the stock traded nationally at a high of in excess of $2.50 per share. We submit the judgment should be increased to reflect the correct measure of damages.

CONCLUSION

The court correctly found a breach of the trust agreement by the defendant-appellant but erred in determining the measure of damages.

The trial court's judgment as to liability should be affirmed and the error of the trial court in fixing the damages should be corrected to award the plaintiff-respondent the highest market value of the stock within a reasonable time after the breach which was $2.50 per share for the 31,500 shares.

Respectfully submitted

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